IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: THE WEINSTEIN COMPANY HOLDINGS, LLC, *et al.*, Debtors.	Chapter 11 Case No. 18-10601 (MFW) (Jointly Administered)
LANTERN ENTERTAINMENT LLC, Plaintiff, v. BRUCE COHEN PRODUCTIONS, and BRUCE COHEN, Defendants.	Adv. Proc. No. 18-50924 (MFW) **Hearing Date: March 26, 2019 at 11:30 a m.** **Objection Deadline: March 14, 2019 at 4:00 p.m.**

MOTION OF EXECUTORY CONTRACT COUNTERPARTIES FOR CERTIFICATION OF DIRECT APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT PURSUANT TO 28 U.S.C. § 158(d)(2)

Bradley Cooper, 22nd and Indiana, Inc., Bruce Cohen, Bruce Cohen Productions, Robert De Niro, Canal Productions, Inc., David O. Russell, Kanzeon Corp., Jon Gordon, and Jon Gordon Productions, Inc. (collectively, the "**Counterparties**") – actors, producers, and the director that collectively participated in the making of the motion picture *Silver Linings Playbook* – respectfully move this Court (the "Motion") for entry of an order, pursuant to 28 U.S.C. § 158(d)(2) and Rule 8006(f) of the Federal Rules of Bankruptcy Procedure (the "**Bankruptcy Rules**"), certifying for direct appeal to the United States Court of Appeals for the Third Circuit the *Order (I) Granting Lantern Entertainment LLC's Motion for Summary Judgment; (II) Denying Motion to Strike of Contract Counterparties; (III) Denying in Part, and Granting in Part, Joint Motion of SLP Contract Counterparties to Clarify Sale Order; and (IV Denying in Part, and Granting in Part, Contract Counterparties' Motion for Order Confirming*

that Counterparties' Agreements Have Been Designated by Lantern for Assumption and Assignment, Including Joinder of Committee [D.I. 2013] (the "**Order**") entered by this Court on January 23, 2019.

In support of the Motion, the Counterparties respectfully state as follows:

PRELIMINARY STATEMENT

1. By this Motion, the Counterparties seek to expedite this long-pending proceeding by certifying the order adjudicating the central legal issue in this case for direct review by the Third Circuit, where it would undoubtedly be heard eventually. That issue – whether the Counterparties' agreements with The Weinstein Company LLC ("**TWC**") are executory, and therefore are required to be assumed and assigned to Lantern Entertainment LLC ("**Lantern**") – was raised by Lantern in a "test case" adversary proceeding against Bruce Cohen Productions ("**Cohen**"), which is one of the Counterparties.[1]

2. In reaching its conclusion that Cohen's agreement is not executory, the Court relied on the "substantial performance" test set forth in *In re Exide Technologies*, 607 F.3d 957 (3d Cir. 2010), as well as various non-binding decisions outside the Third Circuit, to conclude that the remaining ongoing obligations of Cohen under the agreement are not sufficiently "material" to render the agreement executory. On appeal, the Counterparties will argue that the materiality analysis conducted by the Court was precluded by the plain terms of the agreement itself, which defined materiality, and that under *In re General DataComm Indus. v. Arcara (In re*

[1] The Counterparties have appealed the Order on multiple grounds. [*See* D.I. 2103.] While a final determination on all of the issues raised on appeal is required to determine whether the pre-sale obligations lie with Lantern or the Debtors' estates, the central issue regarding whether the Counterparties' agreements are executory only has been determined with respect to Cohen. This leaves open the possibility of numerous adversary proceedings involving actors/directors/producers other than Cohen and the Counterparties, each of which likely would be appealed pending resolution by the Third Circuit. Because Lantern designated the Cohen adversary proceeding as a "test case", resolution by the Third Circuit likely would provide direction to the remaining Counterparties and other talent. Regardless, the adversary proceeding and the summary judgment order apply only to Cohen and the remaining Counterparties reserve all rights.

General DataComm Indus.), 407 F.3d 616 (3d Cir. 2005), the *Exide* analysis of materiality and/or substantial performance is inapplicable and irrelevant.

3. The above-referenced issue is a pure legal issue on which the Third Circuit has not yet explicitly ruled. A direct appeal will enable the Third Circuit to make clear that, in conducting the executoriness analysis, the terms of the parties' agreement control, and that a materiality analysis is only permissible where the agreement is silent on materiality. Additionally, given that the executoriness issue is one that will govern the resolution of numerous disputes between Lantern and other contract counterparties (which have not yet crystallized into adversary proceedings and motions for summary judgment), a ruling on the issue by the Third Circuit undoubtedly will bring closure to the issue of whether millions of dollars' worth of pre-sale obligations lie with Lantern or the Debtors' estates, and therefore advance the progress of the Chapter 11 cases.

4. As explained in greater detail below, a direct appeal of the Order to the Third Circuit is appropriate because each of the disjunctive factors mandating certification pursuant to 28 U.S.C. § 158(d)(2)(A) is met: (a) an immediate appeal from the Order will materially advance the progress of the Chapter 11 Cases, (b) the Order involves a question of law requiring resolution of competing decisions of the Third Circuit, and (c) the Order involves a question of law as to which there is no controlling decision of the Third Circuit or the Supreme Court, and the Order involves a matter of public importance that transcends the parties to the appeal.

BACKGROUND

5. On January 14, 2019, the Court held a hearing to consider the following matters, among others: (1) Lantern's *Motion for Summary Judgment to Determine the Nonexecutory Nature of a Contract* [Adv. D.I. 6] (the "**Summary Judgment Motion**"); (2) *Notice of*

Supplemental Objection and Joint Motion of SLP Contract Counterparties to Clarify Sale Order [D.I. 1664]; and (3) *Motion of Executory Contract Counterparties for Order Confirming that Counterparties' Agreements Have Been Designated by Lantern for Assumption and Assignment* [D.I. 1724] (the "**Motion to Confirm**"). A thorough background of the relevant events giving rise to the Counterparties' disputes with Lantern is set forth in the Motion to Confirm.

6. The Summary Judgment Motion sought a determination that Cohen's producing agreement relating to the motion picture *Silver Linings Playbook* was not executory and therefore could be "purchased" under 11 U.S.C. § 363 without compliance with the assumption/assignment requirements of 11 U.S.C. § 365. At the conclusion of the hearing, the Court rendered its oral ruling that Cohen's agreement is not executory. The Court also decided that, to the extent that any of the Counterparties' agreements listed in Lantern's November 8, 2018 *Supplemental Notice of Filing of List of Assumed Contracts Pursuant to Sale Order* [D.I. 1695] as "Disputed Contracts to be assumed subject to outcome of litigation" are found to be executory, then Lantern must take assignment of such contracts. The Court entered the Order memorializing its ruling on January 23, 2019.

RELIEF SOUGHT, AND QUESTIONS PRESENTED FOR CERTIFICATION

7. The Counterparties respectfully request that the Court certify their appeal from the Order for a direct appeal to the Third Circuit pursuant to 28 U.S.C. § 158(d)(2).

8. The appeal of the Order includes the following questions of law:

(a) Whether a bankruptcy court can substitute its own judgment regarding the materiality of a party's ongoing obligations for what the parties to an agreement explicitly and formally agreed to as being "material" and vital to their agreement; and

(b) Whether a bankruptcy court may make factual findings regarding the materiality of the ongoing obligations in an agreement on summary judgment, prior to the commencement of any discovery

> in the adversary proceeding, and absent any testimonial evidence on that subject.

ARGUMENT

I. LEGAL STANDARD

9. Jurisdiction over appeals from final bankruptcy court orders typically lies with the applicable district court. 28 U.S.C. § 158(a)(1). However, under certain circumstances, bankruptcy appeals may bypass the district court through a process designed to quickly clarify difficult areas of bankruptcy law and establish binding precedent without the need for two consecutive levels of appeals. *See Laura B. Bartell, The Appeal of Direct Appeal—Use of the New 28 U.S.C. § 158(d)(2)*, 84 AM. BANKR. L.J. 145, 146 (2010).

10. Section 158(d)(2) provides that an appeal must be certified for direct appeal to the court of appeals if the following criteria are met:

> (i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;
>
> (ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or
>
> (iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken.

28 U.S.C. §158(d)(2)(A). "If the bankruptcy court [or] the district court . . . determines that a circumstance specified in clause (i), (ii), *or* (iii) . . . exists . . . then the . . . court . . . *shall* make the certification." *Id.* § 158(d)(2)(B) (emphasis added). Certification of an order for direct appeal is mandatory in the presence of any one of the circumstances enumerated above. *See* 28 U.S.C. § 158(d)(2)(B) (providing that certification "shall" be made in that instance); *see also Simon & Schuster, Inc. v. Advanced Mktg. Servs., Inc.*, 360 B.R. 429, 433 (Bankr. D. Del. 2007)

("[T]he court *must* issue a certification if it determines that a direct appeal 'may materially advance' the progress of the case or proceeding in which the appeal is taken.") (emphasis added). The procedure was enacted by Congress to address problems related to the "time and cost factors attendant to the [prior] appellate system . . . ." H.R. Rep. No. 109-31, at 148 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 206.

11. Given the importance of the issue regarding the executory nature of the agreements and its likely effect not only on the Counterparties in these cases (and the Debtors' estates, if the cure amounts owed to the Counterparties are relegated to general unsecured claims), but also on the entertainment industry in general, it is extremely likely that the issue will not be resolved until the Third Circuit has addressed it. As discussed below, all of the three requirements under Section 158(d)(2) are satisfied, and certification is therefore mandatory.

II. A DIRECT APPEAL OF THE ORDER WILL MATERIALLY ADVANCE THE PROGRESS OF THE CHAPTER 11 CASES

12. The Court should certify the Order for direct appeal to the Third Circuit because doing so *will* materially advance the progress of the Chapter 11 Cases by providing clear direction as to whether Lantern must take assignment of the Counterparties' agreements, thereby reducing by approximately $5 million the unsecured claims pool. *See* 11 U.S.C. § 158(d)(2)(A)(iii).

13. As the Court knows, the issue of whether the Counterparties' agreements are executory (and therefore must be assumed and assigned to Lantern) is a central issue that is key to the progress of the Chapter 11 Cases. As the Creditors' Committee noted in its joinder to the Counterparties' motion in connection with the November 8 designation deadline, certainty as to whether the Counterparties' agreements are to be assumed and assigned to Lantern "allows the Debtors to begin marketing the estates' remaining assets, and allows the claims against the

estates to be quantified." [D.I. 1771, ¶ 4.]

14. In the Order, the Court confirmed that "to the extent that . . . the contracts of the Counterparties [designated as "Disputed Contracts to be assumed subject to the outcome of litigation"] are found to be executory by a Court of competent jurisdiction, Lantern Entertainment LLC . . . would be obligated to have any such contracts assumed and assigned . . . ." As Lantern has made clear, it filed the declaratory relief action against Cohen as a "test case." [D.I. 1939, ¶ 11 ("Lantern Entertainment filed an adversary proceeding against [Cohen], effectively to serve as a test case, seeking a declaratory judgment that the Talent Agreement at issue was not executory . . . .").] If the Third Circuit agrees with the Counterparties and determines that Cohen's agreement is executory, Lantern will be required to take assignment of that agreement and likely all of the Counterparties' agreements.[2] This will eliminate the need for multiple adversary proceedings involving the remaining Counterparties and the numerous appeals that will surely arise therefrom. *See Nortel Networks Inc. v. Ernst & Young Inc. (In re Nortel Networks Inc.)*, 2016 U.S. Dist. LEXIS 64592, at *22-23 (D. Del. May 17, 2016) ("[I]t is nearly-certain that these appeals are going to require review by the Third Circuit eventually . . . Moreover, it is essentially certain that one or more parties would be dissatisfied with whatever decision this Court would render and would, therefore, press a further appeal. . . . The numerous pending appeals, as well as the numerous contingent cross-appeals, leave little doubt that appellate review by the Third Circuit is inevitable. Given this reality, having such review sooner rather than later may well result in materially advancing the progress of these cases."); *see also In re MPF Holding US, LLC*, 444 B.R. 719, 727 (Bankr. S.D. Tex. 2011) (concluding that certification is appropriate where resolution of appeal would obviate numerous other appeals and

[2] The Counterparties do not concede that the Court's decision as to Cohen's agreement is preclusive as to the agreements of the remaining Counterparties. The Counterparties reserve all of their rights in connection thereto.

adversary proceedings raising similar issues).

15. Resolving the Counterparties' disputes with Lantern through a direct appeal also will (as the Committee has argued) enable the Chapter 11 Cases to progress to conclusion by bringing sale-related issues to an end, and allowing claims against the Debtors' estates to be quantified. *See Arrow Oil & Gas, Inc. v. SemCrude, L.P. (In re SemCrude, L.P.)*, 407 B.R. 112, 139-40 (Bankr. D. Del. 2009) (certifying order for direct appeal where prompt consideration of the appeal may serve to advance bankruptcy proceedings by allowing debtors to move forward with confirmation of their plan).[3] Accordingly, because an immediate appeal from the Order will materially advance the progress of these cases, certification is appropriate pursuant to Section 158(d)(2)(A)(iii).

III. THE ORDER INVOLVES A QUESTION OF LAW REQUIRING RESOLUTION OF COMPETING DECISIONS IN THE THIRD CIRCUIT.

16. Certification of the Order also is required to harmonize two decisions of the Third Circuit – *In re General DataComm Indus. v. Arcara (In re General DataComm Indus.)*, 407 F.3d 616 (3d Cir. 2005), and *In re Exide Technologies*, 607 F.3d 957 (3d Cir. 2010) – and to determine which of the two decisions should apply to this case. Accordingly, certification also is appropriate pursuant to Section 158(d)(2)(A)(ii). *See In re Millennium Lab Holdings II, LLC*, 543 B.R. 703, 715 (Bankr. D. Del. 2016).

17. Under *General DataComm*, a court analyzing the executoriness of a contract must first determine whether the contract itself specifies acts that would constitute a material breach excusing performance. *Gen. DataComm*, 407 F.3d at 623 (the court "need not look beyond the [contract] itself to make [the] determination" of what constitutes a material breach and "[n]o

[3] Prior to filing this Motion, the Counterparties asked that Lantern stipulate to the certification of the Order for direct appeal. (Doing so would have allowed the Third Circuit either to accept the direct appeal or decline it, and would have saved this Court's time.) Lantern declined.

further analysis is required"). If the contract effectively defines materiality, the court cannot substitute its own views on materiality for what the parties have formally agreed to. *Id.* n.12. By contrast, under *Exide*, a court should analyze whether a party has substantially performed under a contract (such that the party can no longer materially breach that contract) in deciding whether that contract is executory. *Exide*, 607 F.3d at 963.

18. On their faces, *General DataComm* and *Exide* do not appear to conflict with each other – indeed, the *Exide* court cited *General DataComm* with approval. However, Cohen's appeal presents a pure legal issue – namely, whether the decisions can be harmonized and, if so, which of the two decisions should apply in this case (this Court relied on *Exide* and did not address *General DataComm*). Allowing the Third Circuit to clarify whether the *General DataComm* analysis precludes an independent *Exide*-type analysis of materiality/substantial performance, in the context of this case, is necessary in harmonizing the two decisions, and is essential generating binding appellate precedent and ensuring uniformity of bankruptcy decisions throughout the Third Circuit.[4]

IV. THE ORDER INVOLVES A QUESTION OF LAW AS TO WHICH THERE IS NO CONTROLLING THIRD CIRCUIT OR SUPREME COURT PRECEDENT, AND INVOLVES A MATTER OF PUBLIC IMPORTANCE

19. The Court's ruling regarding the executoriness of Cohen's agreement (a work for hire agreement for producing services) involves a question of law as to which there is no controlling decision of the Third Circuit or the U.S. Supreme Court – namely, whether a work for hire agreement can be an executory contract following a release of a film. The Supreme Court has not decided the issue and only one federal court of appeals – the Ninth Circuit – has considered it.

[4] There is no indication that the contract at issue in *Exide* defined materiality in the manner described in the *General DataComm* opinion.

20. In rendering its ruling that Cohen's agreement is not executory, the Court relied on, among other decisions, the Ninth Circuit's decision in *In re Qintex Entertainment, Inc.*, 950 F.2d 1492 (9th Cir. 1991), stating that it "is particularly on point" and that "[t]he primary purpose of a work for hire contract in the industry is the completion of the project and *Qintex* clearly found that a contract was no longer executory where the actor had finished acting and, therefore, had substantially performed the contract." Tr. of Hr'g held on January 14, 2019, p. 134. There is no Third Circuit or Supreme Court decision that supports such a sweeping statement of the law. *Wilmington Trust Co. v. Tribune Media Co. (In re Tribune Media Co.)*, 2016 U.S. Dist. LEXIS 48672, at *9 (D. Del. Apr. 12, 2016) ("Having determined that the appeal raises a question of law as to which there is no controlling decision of the Third Circuit or of the Supreme Court, the court is thus required to certify the appeal in this case.").

21. The issue raised by the Court's ruling also concerns a matter of public importance that transcends the parties to the Chapter 11 Cases. An appeal may "involve a matter of public importance" either because "it involves important legal issues or important practical ramifications." *Jaffe v. Samsung Elecs. Co. (In re Qimonda AG)*, 470 B.R. 374, 386 (E.D. Va. 2012); *see also In re Pac. Lumber Co.*, 584 F.3d 229, 241 (5th Cir. 2009).

22. Courts certify orders for direct review where an issue is likely to arise in other bankruptcy cases, or will impact parties outside of the bankruptcy case. *See, e.g.*, *Qimonda AG*, 470 B.R. at 388 ("The public importance here stems . . . from the substantial ramifications that any decision will cause in the semiconductor industry and for businesses in any industry that heavily rely on patent licensing agreements. At its heart, this matter weighs the important protections of § 365(n) against the essential role of comity in Chapter 15 proceedings. Both are matters of substantial public importance."); *In re Virissimo*, 332 B.R. 208, 209 (Bankr. D. Nev.

2005) (certifying order for direct appeal where issue presented "will recur in Nevada as well as other district . . . and will impact the administration of bankruptcy estates until the issue is ultimately decided"); *Wells Fargo Bank, N.A. (In re Amaravathi Ltd. P'ship)*, 2009 U.S. Dist. LEXIS 67458, at *3 (S.D. Tex. July 29, 2009) ("The issue [on appeal] also has significant public importance because many loan agreements include provisions assigning rents similar to the one in the Loan Documents in the case on appeal.").

23. Here, the public importance of the appeal of the Court's Order stems from the substantial ramifications that it could have on the entertainment industry and talent participation agreements in particular. The Court's Order presently permits a buyer of a bankrupt studio's assets to "purchase" talent participation agreements (relating to films already released) without curing any defaults in those agreements. The result in this case will have a significant effect not only on the Counterparties, but also on all other actors, producers, writers, and directors negotiating multimillion dollar participation agreements with movie studios. Given the sheer volume and frequency of such transactions, and the clear impact that a ruling on the executoriness of such contracts could have on the talent's ability to ensure payment in the event of a studio's bankruptcy, the issues clearly have great public importance within the meaning of Section 158(d)(2). The Order should be certified pursuant to Section 158(d)(2)(A)(i).

NOTICE

24. The Counterparties have provided notice to Lantern, the Debtors, and other interested parties through their counsel.

NO PRIOR REQUEST

25. No prior request for the relief sought in this Motion has been made to this or any other Court.

CONCLUSION

For all of the foregoing reasons, the Counterparties respectfully request that the Court certify the Order for a direct appeal to the United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. § 158(d)(2).

Dated: February 25, 2019

Respectfully submitted,

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